

SIL AD (JOHOR BAHRU) SDN BHD

a

v.

HILTON OSWALD FRANCISCUS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING MOTION NO: 25-4-1996]
30 MAY 1996

b

LABOUR LAW: *Industrial Court - Function of Industrial Court - When interference by High Court warranted - Industrial Relations Act 1967, s. 20*

c

LABOUR LAW: *Employment - Dismissal - Failure to hold inquiry - Whether infringement of audi alteram partem rule - Whether fatal*

This was an application by way of originating motion by the applicant for an order of *certiorari* to quash the award of the Industrial Court dated 22 December 1995 wherein the applicant was ordered to pay the respondent compensation totaling RM177,600.

d

According to the facts of the case, the respondent was employed by the applicant as the creative director on 1 November 1992. However on 17 March 1993, the applicant terminated the employment of the respondent by a letter which disclosed no reasons for such termination and it was not disputed that there was no inquiry conducted by the applicant before the respondent's employment was summarily terminated.

e

Among the issues which arose for consideration were: (i) whether there was an infringement of the maxim *audi alteram partem*; and (ii) what are the functions of the Industrial Court in a reference under s. 20 of the Industrial Relations Act 1967 ('the Act').

f

Held:

g

[1] There was no necessity for the company to conduct an inquiry before terminating the respondent's employment. It was sufficient for the company to lead evidence before the Industrial Court to show reasons for the termination. The initial flaw, therefore, in the company not holding a domestic inquiry was curable by the inquiry that was held before the Industrial Court.

h

i

- a* [2] The function of the Industrial Court in a reference under s. 20 of the Act is, firstly, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues on the merits will amount to a jurisdictional error which will merit interference by the High Court by way of *certiorari*.
- b* Further, the Industrial Court will be acting in excess of jurisdiction if it changes the scope of the reference by substituting its own reason which is not relied upon by the employer for the dismissal.

- c* [3] On the facts of the case, the applicant advanced three grounds for the termination, firstly, the poor work performance of the respondent, secondly the respondent's attitude and thirdly the respondent's conduct in instigating his fellow staff. The President of the Industrial Court had made a correct appraisal of the evidence that was put forth and had not committed any jurisdictional error as would warrant interference by the High Court.

- d* [Application dismissed.]

Cases referred to:

- e* *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 (**fol**)
B Surinder Singh Kanda v. The Government Of The Federation of Malaya [1962] 28 MLJ 169 (**refd**)
- e* *Calvin v. Carr & Others* [1979] 2 All ER 440 (**fol**)
Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Anor [1988] 1 CLJ 1 (**fol**)
Enesty Sdn Bhd v. Transport Workers Union & Anor [1986] 1 MLJ 18 (**fol**)
Federal Hotel v National Union of Hotel, Bar & Restaurant Workers [1983] 1 CLJ 67 (**refd**)
- f* *Hong Leong Assurance Sdn Bhd v. Wong Yuen Hock* [1995] 3 AMR 37 (**fol**)
Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 2 CLJ 6 (**refd**)
Hotel Jaya Puri Bhd v. National Union of Hotel, Bar and Restaurant Workers & Anor [1980] 1 MLJ 109 (**refd**)
- g* *Lee Wah Bank Ltd v. National Union of Bank Employees* [1981] 1 MLJ 169 (**refd**)
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 (**fol**)
O'Reilly v. Mackman & Ors & Other Cases [1982] 3 All ER 1124 (**refd**)
Ridge v Baldwin [1963] 2 All ER 66 (**refd**)
Wong Yuen Hock v. Sykt Hong Leong Assurance Sdn Bhd [1995] 3 CLJ 344 (**fol**)
Workmen of the Motipur Sugar Factory Private Ltd v. The Motipur Sugar Factory Private Ltd AIR [1965] SC 1803 (**refd**)
- h*

Legislation referred to:

Industrial Relations Act 1967, ss. 20, 30(6)

i

For the applicant - Gana Muthusamy; M/s Gana Muthusamy & Co
For the respondent - Vincent Chandran; M/s Badaruzaman, Chandran & Co

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Malik Ishak J:

This was an application by way of an originating motion by Sil Ad (Johor Bahru) Sdn Bhd (hereinafter referred to as “the company”) for an order of *certiorari* to quash the award of the Industrial Court dated 22 December 1995 wherein the company was ordered to pay Mr. Hilton Oswald Franciscus (hereinafter referred to as “the workman”):

- (1) as compensation in lieu of reinstatement the total sum calculated on the basis of 24 months backwages which included salary, petrol and housing allowances totalling RM177,600.00; and
- (2) such sum to be payable less the income tax and EPF contributions within one month from the date of the award.

The facts of this case are not in dispute and they are as follows. On 1 November 1992, the workman was employed by the company as a creative director in Johor Bahru. The terms and conditions upon which the workman was to serve the company are amply set out in a letter which bore the same date and for convenience that letter is reproduced hereinunder:

PRIVATE & CONFIDENTIAL

Date: 01 November 1992
Hilton O’ Franciscus,
101, Jalan 28, Desa Jaya, Kepong,
52100 Kuala Lumpur.

Dear Mr. Hilton,

CREATIVE DIRECTOR

We are pleased to confirm your appointment of the above position with the following terms and conditions of employment:-

COMMENCEMENT

01 November 1992

a DUTIES

You will be reporting directly to the Managing Director.

b

Normal duties of the above captioned post and any other assigned from time to time within the Company. You shall assist the Company in every proper way to obtain for its own benefit patents for discoveries, inventions or improvements thereof in any and all countries and all discoveries of the Company whether patented or not.

c

During your employment with the Company, you shall not at any time hereunder (except so far as is necessary and proper in the course of your work) or afterwards disclose to any person any information as to the practice, business dealings or affairs of the Company or any of its customers or clients as to any other matters which may come to your knowledge by reason of your employment. Also, you shall not enter into any monetary or business connections whatsoever with any clients or business associates of the Company whether directly or indirectly.

d

During the terms of employment hereunder and for a period 24 months the termination of this employment by any means whatsoever, you shall not within the territorial limits of the Johor State engage in business dealings competitive with the business of the Company with any persons, corporations, or associations and shall not engage as an Employee, Officer, Director, Partner or Consultant in any business competitive with that of the Company. In the event that this section shall be determined by any court of competent jurisdiction to be unenforceable by reason of its extending for too great a period of time or over too large a geographic area or over too great a range of activities, it shall be interpreted to extend only over the maximum period of time, geographic area, or range of activities as to which it may be enforceable.

e**f****WORKING HOURS**

Normal working hours:

g

Monday to Friday	–	0830 hrs to 1730 hrs
Saturday	–	0830 hrs to 1230 hrs
Lunch Break	–	1230 hrs to 1330 hrs

You will be required to work outside normal working hours and/or during weekends as circumstances may dictate.

h**SALARY**

You will be paid M\$6,500.00 per month. (Malaysia Ringgit Six Thousand and Five Hundred Only).

i

Your monthly salary will be credited into the savings account under your name at a local bank as per Company's banker.

ACCOMMODATION AND CAR ALLOWANCE

a

You will be paid M\$500.00 on house rental plus M\$400.00 on petrol of motor vehicle per month.

EPF

b

To be shared between yourself and the Company in accordance with the current regulation laid down by the EPF Board.

INCOME TAX

c

Upon termination of employment, the company is entitled to withhold not less than one month of your salary until tax clearance is effected in accordance with Section 83 (5) of the Income Tax Act, 1967.

ANNUAL LEAVE

d

After a year of continuous service, you are entitled to such annual leave as follows:

- 8 days if employed for less than 2 years.
- 12 days if employed between 2 to 5 years.
- 16 days if employed for 5 years and more.

e

Annual leave will be taken at the mutual convenience of the Company and current leave not taken within the stipulated period shall not be brought forward to the next period. The Company reserves the right to liquidate them before the beginning of the new work year.

f

However, if service is terminated and if you have taken more than your pro rata annual leave, the balance of the ineligible annual leave will be deducted from your salary.

You must not apply for more than 16 (sixteen) days of annual leave and moreover, you must give ample notice for the following leave application.

g

(Note: You are not entitled to any advance leave)

No. of Annual Leave	Days of Notice
1 to 2 days	3 days in advance
3 to 5 days	1 week in advance
6 to 16 days	1 month in advance

h

UNPAID LEAVE

The Company will not entertain any unpaid leave unless it is urgent.

i

a MEDICAL BENEFITS

All normal medical expenses, excluding dental, maternity, optical and hospitalisation bills for yourself, will be paid by the Company only when you are examined by Government doctors or company's doctors.

b MEDICAL LEAVE

Upon certification by Malaysian Government doctors or company doctors, you are entitled to such paid sick leave not exceeding in the aggregate of:

- 14 days if employed for less than 2 years
- c** – 18 days if employed between 2 to 5 years
- 21 days if employed for 5 years and more.

However, our Company will only approve medical and hospitalisation leave granted from all Government General Hospitals.

- d** If an employee is certified by a registered medical practitioner to be ill enough to require hospitalisation but is not hospitalised for any reason whatsoever, the employee shall be deemed to be hospitalised.

COMPASSIONATE & MARRIAGE LEAVE

- e** Any employee who has served this Company not less than a year shall be entitled to:

- a) A maximum of 1 (one) day compassionate leave on the death of immediate family member (i.e. parents, brothers, sisters, spouse and children).

- f** b) A maximum of 1 (one) day leave entitlement will be given on the occasion of 1st legal marriage.

TRANSFER AND POSTING

- g** The Company shall have absolute discretion over the transfer and posting of any employee.

ABSENCE FROM WORK WITHOUT PERMISSION

- h** The Company may deduct a proportionate amount from your salary for each day of absence or any part thereto without prior permission of the Company otherwise than in the case of absence by reason of incapability through illness or injury provided that the Company is informed as soon as possible. The Company shall have absolute discretion over the termination of service if you have been continuously absent from work for more than 2 (two) days.

- i**

- a) without prior leave from the Company or without reasonable excuse or; **a**
b) without informing or attempting to inform the Company of the excuse for such absence.

TERMINATION

Upon confirmation, either party shall give 1 (one) month's written notice or 1 (one) month's salary in lieu of short notice. **b**

Unless agreed by the Company, annual leave shall not be used to offset the notice of termination. You will be paid for the unutilised annual leave (pro rata basis) by the Company. **c**

In the event of serious misconduct or neglect of duty or breach of any rules and regulations, the Company shall be entitled to dismiss you without giving any notice.

If you agree to the above terms and conditions, kindly sign the duplicate copy of this letter and return it to us. **d**

Yours sincerely,

SIL-AD COMMUNICATIONS SDN BHD.

(Signed) **e**
...
CHOO CHIANG SENG
Managing Director.

Agreed and accepted by:

(Signed) **f**
...
Name: HILTON O' FRANCISCUS

I/C No: 2110350

It would be pertinent to say that immediately preceding the appointment in Johor Bahru, the workman was employed by the company in its Petaling Jaya office but voluntarily resigned from it. With the new offer, the workman happily came down with his family members to Johor Bahru to take up the new challenge. The workman did work for the company in Johor Bahru but it was shortlived. On 17 March 1993, the company terminated the employment of the workman by letter of the same date. That letter reads as follows: **g**
h

i

a Our Ref: ADM.9818

17 March 1993

Hilton O' Franciscus,

20, Jalan Permas 5/16,

b Bandar Baru Permas Jaya,
81750 Johor Bahru.

Dear Hilton,

TERMINATION OF EMPLOYMENT

c We regret to inform you that the Management has decided to terminate your employment as a Creative Director of the company with immediate effect from 20 March 1993.

We enclose herewith our PBB Cheque No. 029931 dated 19 March 1993 for the sum of RM3,200.00 (Malaysian Ringgit Three Thousand and Two Hundred Only).

d

The breakdown of payment are as follows:

1) Compensation for loss of employment: (One month basic salary in lieu of short notice) RM 6,500.00

e

2) Termination Benefit RM 2,000.00

3) Salary for 1.3.93 to 19.3.93
(17 working days x RM6,500.00

26 days RM 4,250.00

f

3) Balance of Bonus RM 250.00

4) Accomodation RM 500.00

5) Petrol RM 400.00

g

RM13,900.00

Less

a) E.P.F. Contribution for
March 1993 RM(350.00)

h

b) Advance from Company :

(i) On 8.12.92 RM 3,800

(ii) On 11.2.93 RM 1,000

i

RM(4,800.00)

c) 4 days advance		<i>a</i>
annual leave 	RM(1,000.00)	
d) House rent paid for March		
1993 	RM(550.00)	
e) Amount of money due to		<i>b</i>
employee and withheld by		
employer in accordance		
with Section 83 (5) of		
the Income Tax Act, 1967 ..	<u>RM(4,000.00)</u>	
	RM 3,200.00	
	=====	<i>c</i>

Yours Sincerely,

(Signed)

....

CHOO CHIANG SENG

Managing Director

d

Enc.

Received by:-

(Signed)

e

...

Name : Hilton O' Franciscus

I/C No : 2110300

Date : 19/3/93

f

It is clear from the tenor of this letter that no reasons were advanced for the termination of the workman's employment and neither was it disputed that there was no inquiry conducted by the company before the workman's employment was summarily terminated. It was argued that the maxim *audi alteram partem*: the right to be heard was infringed. In *B. Surinder Singh Kanda v. The Government Of The Federation of Malaya* [1962] 28 MLJ 169 PC, Lord Denning said in the context of Inspector Kanda who was dismissed without being given a reasonable opportunity of being heard:

g

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L.C. in *Board of Education v. Rice* [1911] AC 179, 182; 27 TLR 378 down to the decision of their Lordships' *Board in*

h

i

- a* Ceylon University v. Fernando [1960] 1 WLR 223; [1960] 1 All ER 631 PC. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has
- b* lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing. Instances which were cited to their Lordships were *Re Gregson* [1894] 70 LT 106; *Rex v. Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109, and *Goold v. Evans* [1951] 2 TLR 1189, to which might be added *Rex v. Architects Registration Tribunal* [1945] 2 All ER 131; 61 TLR 445, and many others.
- c* Lord Diplock writing for the House of Lords in *O'Reilly v. Mackman and Others and Other Cases* [1982] 3 All ER 1124 HL and after referring to some authorities including *Ridge v. Baldwin* [1963] 2 All ER 66; [1964] AC 40 said at p. 1130:
- d* Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights
- e* accorded to him by the rules of natural justice or fairness, viz to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made.
- f* These authorities laid down a singular principle of law: that there should not be an infringement of the *audi alteram partem* rule. One striking feature of these authorities is this: they were not decided in the context of the Industrial Relations Act 1967. On the failure of the company to apply the *audi alteram partem* rule, the President of the Industrial Court was aware that such failure
- g* would not bar the company from stating the reasons before the Industrial Court but nevertheless he had his misgivings when he said that:
- However, the effect can be disastrous. The employer can simply dismiss unwanted employees without stating any reason and only state the reason which may include manufactured ones to strengthen its case when the case is referred
- h* to the Industrial Court.

In the next paragraph, the President of the Industrial Court continued:

i

The absence of an inquiry before a workman loses his job plus the absence of any reason for the dismissal should, in my view prompt the Industrial Court to be wary of the reason or reasons given by the employer to it. It should scrutinize them if they actually existed and were in the minds of the employer when the decision to dismiss was made.

Two things must be put in perspective. Firstly, under s. 30(6) of the Industrial Relations Act 1967 the Industrial Court is not vested with a wide power so as to enable it to make an order without a proper legal basis (*Hotel Jaya Puri Bhd v. National Union of Hotel, Bar and Restaurant Workers & Anor* [1980] 1 MLJ 109 especially at p. 114; *Lee Wah Bank Ltd v. National Union of Bank Employees* [1981] 1 MLJ 169 especially at p. 170). Secondly, an Industrial Court is not a court of unlimited jurisdiction and cannot therefore act outside its terms (*Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers and Anor* [1984] 1 MLJ 363 FC; [1984] 2 CLJ 6 FC; *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers* [1983] 1 MLJ 175 FC; [1983] 1 CLJ 67 FC).

In my judgment, there was no necessity for the company to conduct an inquiry before terminating the workman's employment. Suffice if the company leads evidence, which they did, before the Industrial Court to show the reasons for the termination. In *Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Anor* [1988] 1 MLJ 111 SC, Wan Suleiman SCJ (as he then was) cited with approval a decision from the Indian Supreme Court's case of *Workmen of the Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limited* AIR [1965] SC 1803 particularly the following passage:

Where an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify his action before the Tribunal by leading all relevant evidence before it. The entire matter would be open before the Tribunal. It will have jurisdiction not only to go into the limited questions open to a Tribunal where domestic inquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry is merely that the Tribunal would not have to consider only whether there was a *prima facie* case but would decide for itself on the evidence adduced whether the charges have really been made out.

and thereafter his Lordship proceeded further to say that:

In India, it seems the failure is not fatal to the employer and he would be entitled to justify it before the Industrial Tribunal. If he had held the inquiry, he should have been told that they would not interfere unless they want the inquiry to be fair. If no inquiry had been held, the matter is at large.

a Mohd. Azmi SCJ (now FCJ) in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd (& Anor Appeal)* [1995] 3 AMR 2145 followed the decision of *Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Anor (supra)* and his Lordship succinctly said:

b In our opinion *Dreamland* did not belittle the importance of complying with any statutory or contractual enquiry before dismissal in all master and servant cases outside the purview of the Industrial Relations Act. What *Dreamland*, following the curable principle in *Motipur* and *Calvin* laid down was that failure on the part of the employer to hold a proper domestic inquiry should not deprive the Industrial Court of jurisdiction and nor excuse it from the obligation to hear the reference on its merits. We therefore could not find any reason to reject the two authorities. In any event, we held the view that once a case of wrongful dismissal had been properly referred by the Minister under s. 20(3), the Industrial Court was seised with jurisdiction and was obliged under the Act to determine the dispute on its merits. Thus, even where there was a breach of contractual or statutory obligation to hold an inquiry, the Industrial Court should proceed to determine on the merits firstly, whether the misconduct complained of was in fact committed by the employee, and secondly whether the nature and extent of the misconduct could constitute just cause or excuse for the dismissal.

e That part of the decision in *Dreamland* where Wan Suleiman SCJ (as he then was) referred to the situation of a master and servant relationship is best illustrated by citing the relevant part of his Lordship's judgment at p. 116 as follows:

f The short answer to Mr. Lobo's argument is that the right to hearing, or as it is sometimes called the observance of procedural safeguards, is only applicable in respect of a hearing before an administrative tribunal and similar quasi-judicial tribunals performing judicial functions but do not apply to simple master-servant proceedings, such as the present one.

g From the available evidence, the initial flaw in natural justice by the company in not holding a domestic inquiry was "curable" by the inquiry that was held before the Industrial Court and this is the law as exemplified by *Motipur's* case (*supra*); *Calvin v. Carr & Others* [1979] 2 All ER 440; *Dreamland (supra)* and *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd (supra)* and the President of the Industrial Court was clearly aware of the current law on this point.

h Now, what must the Industrial Court do in a reference under s. 20 of the Industrial Relations Act 1967? The answer is found in the recent Federal Court case of *Hong Leong Assurance Sdn Bhd v. Wong Yuen Hock* [1995] 3 AMR 37: 2170 FC; [1995] 2 MLJ 753 FC, which was cited with approval by Mohd. Azmi FJ in *Milan Auto Sdn Bhd v. Wong Seh Yen* [1996] 1 AMR 49 especially at p. 57 in these words:

i

As pointed out by this court recently in *Hong Leong Assurance Sdn Bhd v. Wong Yuen Hock (supra)*, the function of the Industrial Court in dismissal cases on a reference under s. 20 is two fold: firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by *certiorari* by the High Court. Further, the Industrial Court would be acting in excess of jurisdiction if it changed the scope of the reference by substituting its own reason, that is to say a reason not relied upon by the employer for the dismissal.

In the statement of reply, the company advanced three grounds for the termination of the workman. I shall now examine these grounds separately always putting to the forefront of my mind the sage words of Mohamed Azmi SCJ (now FCJ) in *Enesty Sdn Bhd v. Transport Workers Union & Anor* [1986] 1 MLJ 18 especially at p. 24. This was what his Lordship said:

In other words if there is an error of law on which the award of the Industrial Court is founded such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity, and this must be construed as a nullity resulting from the Industrial Court doing or failing 'to do something in the course of the inquiry which is of such a nature that its decision is a nullity' as referred to by Lord Reid at p. 171 in *Anisminic's* case or the court 'having asked themselves the wrong question' as referred to by Lord Diplock at p. 187 in *In re Racal Communications Ltd*.

Lord Pearce in the House of Lords case of *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 especially at p. 195; [1969] 1 All ER 208 especially at p. 233 said:

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged in a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

Yet another guideline for this court to follow would be that as stated by Seah FJ (as he then was) in *Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor (supra)* where at p. 371, his Lordship said:

- a* We do not think that a proper approach had been adopted by the learned judge of the High Court in dealing with the matter before him.

- b* In the exercise of his inherent supervisory jurisdiction over inferior tribunals of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law.

The First Reason

- c* Poor work performance and did not live up to the standard expected of a person occupying the position and status of a creative director.

- d* Through the marketing director of the company one Mr. Lim Sze Boon it was sought to show that the quality of work performed by the workman was not up to the mark. Several finished products were exhibited and shown to this court and it was said that there were errors and omissions in these finished products which caused financial losses to the company. It was said that the company had to give discounts and the invoices were treated as bad debts. The company incurred a total loss of RM89,592.75. The President of the Industrial Court approached this issue by adverting to two letters which were crucial to adjudicate the matter. The first letter (it was worded as a memorandum) was dated 3 February 1993 some 1½ months before the termination of the workman and that letter was signed by Mr. Lau Seng Khoon. It reads as follows:

MEMORANDUM

- f* To : Hilton
From : Lau Seng Khoon
Date : 3rd February 1993

c.c. : Mr. Choo

- g* **PRIVATE & CONFIDENTIAL**

I must say I was totally disappointed with those works I saw for Redbull & Lee's Pineapple Juice, in JB this morning.

- h* It had indicated to me that:

- a) Manhours are down the drain - as we don't even establish a position for Redbull (vs Livita) in Malaysia at all.
- b) We don't understand what is "drinks for sports" and what is "energy drinks".

- i*

c) We don't understand "introduction of product to market" and how to sustain the interests and to develop the product further. (I am not talking about brand, but PRODUCT!). *a*

d) Account Servicing and Creative staff are far from working as a team - you don't understand each other at all. And worst of all, the understanding of common words/tactics are also far apart! *b*

There is a need to iron out some basic understanding of "advertising jargon".

I also, do hope that you, on your part, do improve the accuracy of your works.

(Signed)
Lau Seng Khoon *c*

The workman replied and his reply was dated 15 February 1993 which was worded in this manner:

To : Mr. Lau Seng Khoon
From : Hilton O' Franciscus *d*
Date : 15th Feb. 1993

C.c. : Mr. C.S. Choo

Re: REDBULL CONCEPT PRESENTATION

I would like to reply to your memo dated 3rd Feb. 1993 *e*

In the abovementioned instance, my 'inaccuracy', sprang out of a number of reasons that I believe proved relevant.

* The product is that it is not in its introductory stage. It has been available in the market for quite some time now. *f*

* Considerable competitors' advertising has made Energy Drinks a product the consumer is well familiar with.

* The brand enjoys a market share thus indicating brand acceptance awareness, and *g*

* The brand has seen limited advertising exposure and cannot, in my humble opinion, benefit from a 'back to basics' platform.

* Advertising must eclipse the competitors' efforts, leap frog over their messages and penetrate loyalty barriers. *h*

Much of the above was endorsed by the client in his opening statement at the meeting.

Creative accuracy is at best a grey area. Highly creative approaches as much as strategically sound ones have been known to bomb out for any number of reasons. *i*

a In retrospect, the materials that Client Servicing wanted to junk were the ones that Client responded to best. I am content that despite the fact (that) the Client threw the marketing strategies, which we were coerced into working to, out (of) the window, we actually had something to show him that stimulated his interest. And at the end of the day, is that not **our** ultimate objective?

b I hope my efforts to produce good advertising is never mistaken as an ego trip. But that it is fuelled by an overwhelming desire to give Sil Ad and her Clients the best I have to give.

Thank you,

c Yours faithfully,

(Signed)
Hilton O' Franciscus

d The President of the Industrial Court then proceeded to consider whether the poor work performance as alleged had been established, and whether the proven poor work performance, if established, constituted just cause or excuse for the dismissal. This was what the President of the Industrial Court said after perusing these two letters:

e From the two letters it is clear that there was a dispute between COW2 (referring to Mr. Lau Seng Khoon) and the claimant (referring to the workman) as to the correctness of a REDBULL CONCEPT PRESENTATION. There was a dispute if advertising is objective or subjective. COW2 said it was objective whereas the claimant said that it was subjective. But one has to remember that claimant was a professional creative director whereas COW2 was then a director of the company and has not claimed and has not convinced me that he is capable of commenting on the work of a creative director. So too with COW4

f (referring to Mr. Lim Szer Boon), the marketing director. He may be good in marketing, but is he qualified to comment on the efficiency of the work of a person belonging to another profession?

g In another paragraph of the award, the President of the Industrial Court said:

h Even if poor performance was the reason for the dismissal, the evidence shows that he was not solely to blame. This can be found in the claimants evidence when it clearly shows it was the work of a team with the claimant in charge. Moreover one cannot expect to get a good result if the instructions given by the sales department are faulty. There is no evidence to show that the claimant has to get confirmation of the instructions given to him by the sales department from the clients.

i

In coordinating and administering the work of the creative department and at the same time conceptualising the design, the workman must necessarily obtain the cooperation of the whole team. Team work was the order of the day as there was no evidence that the workman had direct access to the instructing clients. Insufficient information was relayed by the marketing division and this state of affairs continued even though the workman had sought to obtain further information. The finished products as shown to this court involved an exercise of one's subjective thinking. It cannot be said to be objective as what was sought to be argued. Indeed one need only look at those finished products to conclude that advertising was totally subjective in approach. Of the ten complaints, only two stood out prominently. One was in regard to the King Cup Brand sardines where there was confusion between sardine and mackerel. A sardine is defined in the Shorter Oxford English Dictionary as a small fish of the herring family. A mackerel, on the other hand, is defined in the same Dictionary as a sea-fish, *Scomber scombrus*, marked on the back with dark stripes; much used for good. Two tins of King Cup brands bearing the pictorial illustrations of the sardine and the mackerel were shown to this court, and I must confess that by looking at those pictorial illustrations, it is difficult to differentiate between the sardine pictorial illustration and that of the mackerel pictorial illustration. This is where the subjectiveness comes into the picture. The other complaint was in regard to the 400,000 copies of the pocket calendars where there was the non-printing of "31 December" on them and this, according to Mr. Lim Szer Boon, was a costly mistake as the company had to give a discount of RM16,800. That mistake was certainly a team mistake and not the mistake of the workman solely. It was certainly unfair to single out the workman for that mistake. It was submitted that the company had adduced sufficient evidence to show that the workman's services were terminated for just cause and excuse. It appears that the company was not too happy with the explanation of the workman as reflected in the letter dated 15 February 1993. I have to ask myself here whether the Industrial Court while engaged in the inquiry departed from the rules of natural justice or that the Industrial Court had asked itself the wrong questions or for that matter had taken into account matters which it ought not take into account and, consequently, the Industrial Court would step outside and act beyond its jurisdiction. I have anxiously scrutinised the notes of evidence and the award by the President of the Industrial Court and I have no hesitation in answering these questions in the negative. Mr. Lim Szer Boon was asked by the company to list out the mistakes purportedly done by the creative department and he did just that. This can be seen at CO8 at encl. 13 pp. 54 and 55 and the President of the Industrial Court took exception to CO8 as it was prepared "a couple of months ago" by Mr. Lim Szer Boon. Though the President of the Industrial Court was aware that the non-holding of a domestic inquiry by the company was "curable" by the inquiry that was laid before him nonetheless he remarked, quite rightly, that:

- a* ... COW4 (referring to Mr. Lim Szer Boon) was asked by the company to prepare CO8 listing all the mistakes purportedly done by the creative department. The question is why only before the hearing the company started searching and gathering facts to find faults of the claimant? Why was this not done before claimant was dismissed on 20 March 1993? Why was no reason for dismissal given in the letter of dismissal (CL2) (referring to the letter of termination dated 17 March 1993 from the company to the workman)? Except for CO6 (referring to the memorandum from Mr. Lau Seng Khoon dated 3 February 1993 addressed to the workman) which has been reproduced above, the company has chosen not to issue any letter to the claimant asking him to show cause as to all the ten complaints listed out in CO8. As such it is open to suspicion if this reason was in the mind of COW1 (referring to Mr. Choo Chiang Seng) when he decided to dismiss the claimant. What COW1 had in mind might be as suggested by the learned counsel for the claimant that claimant's salary was too high.
- b*
- c*

- d* Can these questions posed by the President of the Industrial Court as set out above be considered wrong questions or matters that ought not to be considered. Of course, I have no jurisdiction to consider the merits of the case but I must consider whether the President of the Industrial Court has performed his duties according to law. In my judgment, the President of the Industrial Court rightly considered and determined whether the poor work performance complained of by the company has been established and in so doing he had gone a step further to say that there was no just cause or excuse in terminating the services of the workman (*Hong Leong Assurance Sdn Bhd v. Wong Yuen Hock (supra)*).
- e*

The Second Reason

- f* The claimant's poor attitude shown towards his superiors, his colleagues and the company.

- g* I do not propose to consider this issue as it was abandoned in the course of argument before me. Indeed, on the available evidence, there was nothing to show or point to the negative attitude of the workman as alleged.

The Third Reason

- The claimant (referring to the workman) had instigated and provoked dissatisfaction among fellow staff.
- h* Towards this end, attempts were made by evidence *viva voce* before the President of the Industrial Court to show that the workman had instigated Julian Chua Soon Kwang, an art director, to the effect that Julian Chua Soon Kwang was inadequately paid. That instigation was said to have triggered the resignation of Julian Chua Soon Kwang on 2 March 1993 which took effect
- i*

on 19 March 1993. Surprisingly, through Mr. Choo Chiang Seng it was established that Julian Chua Soon Kwang left the company for a different reason. That reason was reflected in the letter of resignation dated 2 March 1993 which is reproduced for convenience: *a*

CHUA SOON KWANG,
DEPT: STUDIO, *b*
2ND MARCH 1993

Mr. Hilton,
Creative Director.

Dear Sir, *c*

RESIGNATION

I regret to inform you that as of 19.3.1993 (with - 9 days of A. Leave), I'll be resigning from the company due to health condition.

Sorry for any inconvenience cause(d). *d*

Thank you.

Yours faithfully,

(Signed) *e*
2.3.93

NOTE: A copy of this letter is also
sent to Mr. C.S. Choo.

Julian Chua Soon Kwang gave evidence for the company before the President of the Industrial Court and to appreciate his evidence, it would be germane to reproduce that part of his testimony: *f*

I told myself I wanted to leave the advertising business. The reason stated in CL4 (referring to the letter of resignation dated 2 March 1993) is just an excuse to resign. *g*

I was a bit fed up with the advertising work and I could not stand the pressure. The reason was partly due to the pay which was inadequate.

Under cross-examination, Julian Chua Soon Kwang was more specific and categorical. He said his pay commensurated with his work and that he left the company voluntarily. He even testified that he had intended to resign even before he wrote the letter dated 25 February 1993, where he sought for a salary adjustment from RM2,000 per month to RM5,000 per month. *h*

i

- a* The workman took to the stand and he, as correctly stated by the President of the Industrial Court, “vehemently denied that he had instigated COW3 (referring to Julian Chua Soon Kwang) or anybody else to leave the company’s employment.” In my judgment, the President of the Industrial Court made a correct appraisal of the evidence that was put forth before him. Julian Chua
- b* Soon Kwang’s evidence put an immediate end to the allegation of instigation. In my judgment, in carrying out his onerous duty the President of the Industrial Court had not committed any jurisdictional error as to warrant this court to interfere. *Certiorari* should not issue to the benefit of the company. With that, encl. 4 was dismissed with costs.

c

d

e

f

g

h

i